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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

FRED GABLE, CHARLIE HUTTER,
Petitioners,

vs.

STATE OF ALABAMA.

No. 749

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

WILLIAM N. McQUEEN,
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BERNARD F. SYKES,
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On the Brief.

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The due process clause in the Fourteenth Amendment to the Constitution of the United States does not guarantee to an accused on trial in a state court a right to uninterrupted and absolute presense at all stages of his trial but only guarantees a fair trial, and a fair hearing, and a fair opportunity to be heard.

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When instructions are given to a jury in the absence of accused but have been adequately covered by a prior oral charge and also are immediately repeated in the presence of accused, and the record affirmatively shows that there is no possibility of prejudice there is not a deprivation of life or liberty without due process of law within the meaning of the Fourteenth Amendment.

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BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A

STATEMENT OF MATTER INVOLVED

The statement of the matter involved as it appears on pages 1 through 3 in petitioner's brief is substantially correct, but materially incomplete.

In order that this Honorable Court may not be misled by counsels' omission, and since the Court

should have a less fragmentary summary in mind at the outset of its consideration of the petition, we wish to extend the quotation begun on page two of petitioner's brief for the purpose of including the remedial action or procedure that was instantly adopted by the trial court at the time the alleged error occurred. We quote from pages 100, 101 and 102 of the printed record, being part of the bill of exceptions of the original record:

> "After the jury was given the case on December 3, 1941, the jury was returned to the court room at about two o'clock p. m., on the afternoon of December 4, whereupon the following proceedings were had:
>
> "By the Court: Gentlemen, is there any question of law that is bothering the jury in any way? If so, I would be glad to assist you in any way I can.
>
> "Juror: Your Honor, Judge, would it be all right for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?
>
> "The Court: You could; yes, sir.
>
> "Juror: On the other hand, if we reach a verdict on one could we call a mistrial on the other two?

"The Court: Yes, sir. Anything else?

"Juror: No, sir.

"The Court: All right, you may retire.

"Counsel for Defendants: Judge, I want to note an exception to the instructions of the Court to the jury in the absence of the defendants.

"The Court: Correct you are. Let that jury come back. Let the defendants be brought into court. I had them before dinner, and didn't notice they were not present. Tell that jury to come back.

"Whereupon the jury was brought back into the court room and the defendants were brought from the County Jail where they were being held in custody, into the court room. Thereupon the following proceedings were had —the jury and the defendants at this time being present:

"The Court: Gentlemen, of the jury, one of the attorneys for the defendants has called my attention to the fact that the defendants were not present in court at the time the (fol. 75) juror asked two questions a while ago. I sent for you this morning and also sent for the de-

fendants, and it also escaped my attention that they were not present at the time the questions were asked the Court and the answers made by the Court touching the legal questions inquired about, and, as stated that was improper for these questions to be asked in the absence of the defendant and in order that there may be actually no damage done, I will ask the juror to repeat those two questions in the words as near as possible as you asked the court a while ago.

"Juror: Does he have a record of it.

"The Court: Yes. I will ask the Reporter to read the questions.

"Pursuant to the request of the Court, the Court Reporter read the question propounded by a member of the jury and the instructions of the Court made in response thereto as follows: 'Your Honor, Judge, would it be alright for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?'

"The Court: Is that your question?

"Juror: Yes, sir.

"The Court: You could. The answer of the Court to that is that you could. Now read the question, Mr. Reporter.

"Reporter Reads: On the other hand, if we reach a verdict on one, could be call a mistrial on the other two?

"The Court: That your question?

"Juror: Yes, sir.

"The Court: The answer to that is, you could. Is there any other information I could give you?

"Juror: There is another question we want to ask. Was those guns loaded or was they empty when they were arrested in Montgomery.

"The Court: You will have to consult your own recollection as to the evidence in the case. The Court couldn't give you any information at all as to that. You will have to rely on your own recollection as to that.

"The defendants instituted an exception to the Court's instructions to the jury.

"Whereupon the jury retired for further consideration of the verdict."

The concluding part of the colloquy may now be observed in its proper place.

B

BRIEF AND ARGUMENT

It is the purpose of our argument to show that:

I

THE DUE PROCESS CLAUSE IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT GUARANTEE TO AN ACCUSED ON TRIAL IN A STATE COURT A RIGHT TO UNINTERRUPTED AND ABSOLUTE PRESENCE AT ALL STAGES OF HIS TRIAL BUT ONLY GUARANTEES A FAIR TRIAL, AND A FAIR HEARING, AND A FAIR OPPORTUNITY TO BE HEARD.

Rule 45, Supreme Court of Alabama

Howard v. Kentucky, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189

Frank v. Mangum, 237 U. S. 309, 50 L. Ed. 969, 35 S. Ct. 582

Johnson v. U. S., 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549

144 *A. L. R.* 199

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674

Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262, 4 S. Ct. 202

Schwob v. Berggren, 143 U. S. 442, 36 L. Ed. 218, 12 S. Ct. 525

Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136

Whittaker v. State, 173 Ark. 1172, 294 S. W. 397

Lowman v. State, 80 Fla. 18, 85 So. 166

Section 6, Constitution 1901

II

WHEN INSTRUCTIONS ARE GIVEN TO A JURY IN THE ABSENCE OF ACCUSED BUT HAVE BEEN ADEQUATELY COVERED BY A PRIOR ORAL CHARGE AND ALSO ARE IMMEDIATELY REPEATED IN THE PRESENCE OF ACCUSED, AND THE RECORD AFFIRMATIVELY SHOWS THAT THERE IS NO POSSIBILITY OF PREJUDICE THERE IS NOT A DEPRIVATION OF LIFE OR LIBERTY WITHOUT DUE PROCESS OF LAW WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

Sandusky Cement Co .v. Hamilton, C C A Ohio 1923, 287 F. 609, Cert. den. (1923) 262 U. S. 759, 67 L. Ed. 1219, 43 S. Ct. 705

People v. La Munion, 64 Mich. 709, 31 N. W. 593

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Felts v. Murphy, 201 U. S. 123, 50 L. Ed. 689, 26 S. Ct. 366

Ferguson v. State, 24 Ala. App. 491, 137 So. 315, Cert. den. 223 Ala. 521, 137 So. 317

McNutt v. State, 25 Ala. App. 129, 142 So. 773

Boyd v. State, 153 Ala. 41, 45 So. 591

Ray v. U. S., 114 F. 2d 508, Cert. den. 311 U. S. 709, 85 L. Ed. 461, 61 S. Ct. 318

Rule 45, Supreme Court of Alabama.
Title 7, Rule 45, Code of Alabama 1940

Whittaker v. State, 173 Ark. 1172. 294 S. W. 397

Lowman v. State, 80 Fla. 18, 85 So. 166

144 *A. L. R.* 199

Lee v. State, 13 So. 2d 583, 591

Title 30, Section 100, Code of Alabama 1940

Johnson v. U. S., 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674

I

An examination of the opinion of Bricken, P. J., of the Court of Appeals of Alabama shows that the trial court's judgment of conviction, insofar as the point raised by the petition for certiorari is concerned, was affirmed upon two and only two grounds: (See pp. 37 and 39-40 of Petitioner's Brief)

1. The absence of accused during instruction of the jury would not have occurred had his counsel —who was present—suggested their absence to the trial judge.

2. The instructions inadvertently given in defendant's absence were cured by an immediate repetition of the instructions in defendant's presence, and the occurrence did not injuriously affect de-

fendant's substantial rights. Rule 45 Supreme Court of Alabama.

Neither the occurrence at the trial nor the judgment and opinion of the Court of Appeals deprived the accused of any right that he may claim under the due process clause of the Fourteenth Amendment. Those fundamental and basic rights protected by the Fourteenth Amendment and framed to protect persons from arbitrary and unfair procedure in the state courts do not include the right to be present at each and every stage of a criminal trial in a state court. *Howard v. Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189; *Frank v. Mangum*, 237 U. S. 309, 50 L. Ed. 969, 35 S. Ct. 582; *Johnson v. U. S.*, 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549. See also 144 *A. L. R.* 199.

To determine whether there is a right to be present at each individual stage of the trial in a state court we must look not only to the words of the State Constitution, statutes, and their constructions—but also to the words of the Foureenth Amendment and to the rights previously enumerated in the Federal Constitution that have been held to be absorbed by the concept of due process in the Fourteenth Amendment. It is significant to note that the Constitution of Alabama, 1901 (see Appendix D, p. 44 of Petitioner's Brief) does not expressly provide for the presence of accused at all stages of the trial. Section 6, Constitution of Alabama 1901. While we do not contend that the accused may be absent from his trial, nor that the Alabama Consti-

tution fails to require such presence, nor that the absence of accused at an important step in the trial must not in ordinary cases require a reversal; we do contend that it is the law in Alabama that occasional absence of the accused may be cured by immediate action by the trial court and by the application of Rule 45 of the Alabama Supreme Court. (Petitioner's Brief, p. 40). That is what the opinion of the Alabama Court of Appeals decides, and the Supreme Court must be bound by this exposition of the law of the State. *Howard v. Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189.

The petitioner, however, having failed to show his deprivation of due process as that term is used in the State Constitution is now seeking protection from the rights protected by the Fourteenth Amendment. Does the Federal Constitution guarantee the accused an absolute right to uninterrupted presence at his trial in a state court without reasonable exceptions? The construction previously given to the Fourteenth Amendment indicates clearly that no such absolute right is contained in the due process clause of the Fourteenth Amendment.

The decision rendered by this court in 1906 should be controling. In *Howard v. Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189, it appears that the accused was convicted for the capital crime of murder; a juror was questioned by the trial court in the absence of accused and his counsel and this juror was discharged. The accused by writ of error

complained that he was not accorded due process of law guaranteed by the Fourteenth Amendment. This Court said:.

> "It is manifest, therefore, that it is the law of Kentucky that occasional absence of the accused from the trial from which no injury results to his substantial rights, is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

In short—occasional absence of accused without injury does not invoke the protection included in the Fourteenth Amendment.

Again in *Frank v. Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582, the Supreme Court had an analogous question to decide. This language from the opinion is apt:

> "It is insisted that the enforced absence of Frank at that time was not only a deprivation of trial by jury, but was equally a deprivation of due process of law within the meaning of the amendment, in that it took from him at a critical stage of the proceeding the right and opportunity to be heard. But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the

> 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, *so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with.* Indictment by grand jury is not essential to due process * * * (cases cited) * * * Trial by jury is not essential to it, either in civil cases * * (cases cited) * * or in criminal * * * (cases cited) * *" (Emphasis ours.)

Justice Holmes, although dissenting, concurred with the majority opinion so far as the question of the accused's presence was concerned:

> "* * * We never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States."

Though the case of *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, relied upon by petitioner, is easily distinguishable from the case at bar, a careful reading of Justice Cardozo's opinion shows that the accused's uninterrupted presence at his trial in a state court is not a right protected by the Fourteenth Amendment especially when no substantial rights are injured.

In the *Snyder case*, supra, it is to be noted that the injurious effects of accused's absence were taken into consideration by this court as a controling fac-

tor. We also point out the following excerpts from the opinion that are authority for our position:

> "We *assume* in the aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the 14th Amendment to be present in his own person *whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.*" (Emphasis supplied)

> "Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the 14th Amendment assures the privilege of presence when presence would be useless or the benefit but a shadow."

> "So far as the 14th Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

> "There can be no sound solution without an answer to the question whether in the particular conditions exhibited by the record the enforced absence of the defendant is so flagrantly unjust that the Constitution of the United States steps in to forbid it."

From the *Snyder case*, supra, we may state the rule to be: That the uninterrupted presence of the

accused at his trial or its incidents is not an unqualified element of due process required by the Fourteenth Amendment, that presence is an element of due process only when absence under the particular circumstances of the case amounts to a denial of a *fair hearing*. Absence at a particular time during a trial or during its incidents may or may not amount to a denial of a fair hearing or opportunity to be heard. It is only when absence amounts to a denial by the state of a *fair hearing* that the Fourteenth Amendment requires presence.

> "What is fair in one set of circumstances may be an act of tyranny in others. This court has not yet held that even upon a trial in court the absence of a defendant for a few moments while formal documents are marked in evidence will vitiate a judgment." *Snyder v. Massachusetts, supra.*

The footnote to this statement contains this comment:

> "What was said in Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262, 4 S. Ct. 202, supra, and Schwob v. Berggren, 143 U. S. 442, 36 L. Ed. 218, 12 S. Ct. 525, supra, on the subject of the presence of a defendant was dictum and nothing more. See p. 323, supra, of this opinion. We may say the same of Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011, 13 S. Ct. 136, supra, with the added observation that it deals with

the rule at common law and not with constitutional restraints. There are decisions in the state courts that a conviction will stand even though rulings have been made by the trial court in the absence of the defendant if it appears that they could not by any possibility have resulted to his hurt. Whittaker v. State, 173 Ark. 1172, 294 S.W. 397; Lowman v. State, 80 Fla. 18, 85 So. 166."

An inquiry into the record, therefore, is necessary to determine whether a fair hearing has been denied.

We shall now show that under the particular facts of this case petitioner was not denied a fair hearing, and hence that the Fourteenth Amendment and Federal jurisdiction are not now available to petitioner.

II

In showing that no substantial injury was caused the defendants in the trial below we call this court's attention to these points:

1. During the oral charge given by the trial judge which included the following statement as shown by the record the defendants were present and accompanied by their counsel: (Printed record p. 121-122)

"Now, gentlemen, if you are convinced

from the evidence beyond all reasonable doubt, and to a moral certainty, that one or more of these defendants are guilty, as stated, it would be your duty to bring in a verdict of guilty. And you will consider each case individually. In other words, you will determine whether or not Gable is guilty or innocent, whether or not Glenn Townes is guilty or innocent and whether or not Charlie Hutter is guilty or innocent, weighing the testimony with respect to each defendant separately and individually. And before you can arrive at a verdict of guilty or a verdict of not guilty with respect to any one of them or all of them the minds of all twelve of the jurors must come together and agree. In other words, if some one or more of you were convinced that the defendants, one or more, are guilty, and others not convinced, there would be no verdict either of guilty or not guilty, but a mistrial with respect to one or more of the defendants, because there can be no verdict either of guilty or not guilty unless each individual juror's mind merges and coincides with the other jurors in the case."

When the above oral instruction was given to the jury the defendants were not in jail. Defendants and counsel were present in open court and not one breathed an objection. A comparison of the above quoted oral charge with the instructions given in defendants' absence shows that both are more than substantially the same, their substance is identical. An inspection of the record as a whole shows

that at the time the instructions were given in defendants' absence the substance of those instructions had already been given in open court. Nothing new was added when the same instructions were given in defendants' absence.

Opposing counsel would probably contend that regardless of the previous giving of the identical instruction defendants had the *privilege* to hear the ones given in his absence. This *privilege* for which counsel contends is a privilege, the benefit of which would be "but a shadow." *Snyder v. Massachusetts*, supra.

It has often been held that repetition of matter in defendants' absence that adds nothing new to matter previously covered is no ground for reversal. *Sandusky Cement Co. v. Hamilton*, C C A Ohio 1923, 287 F. 609, cert. den. (1923) 262 U. S. 759, 69 L. ed. 1219, 43 S. Ct. 705; *People v. La Munion*, 64 Mich. 709, 31 N. W. 593; *State v. Nardella*, 108 N. J. L. 148, 154 Atl. 834. And in *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 S. Ct. 366, this court indicated that when the accused does not hear the testimony at the trial the proper procedure is to repeat such testimony to the accused.

2. Counsel's brief (p. 22-23) would have this court believe that the trial judge was surreptitiously instructing the jury and was caught by defense counsel arriving and making his objection at the pronouncement of the last syllable of the instruc-

tions (petitioner's brief p. 22-23). This was obviously not the case. The judgment entry recites that counsel were present at every stage of the proceedings (R. 133-134). The bill of exceptions shows no contradiction of this fact. We must assume, therefore, that counsel were present in open court during the giving of the instructions in defendants' absence. Can we assume that counsel did not know that his clients were absent? If the injury caused to the defense was as grievous as counsel now contends, was that not obvious to counsel at the beginning of the instructions? Can we assume that counsel (two of the ablest and most prominent firms of attorneys in this State—R. 139) were ignorant of the necessity of the personal presence of the accused? Counsel excepted to the instructions it is true, but counsel did not object to the jury being re-instructed in defendants' presence. Counsel did not move for a mistrial; and the only reason we are able to assign is that the substance of the juror's questions indicated that it was probable that two of the defendants would be acquitted. Counsel did not want a mistrial at this point, but quite naturally speculated on a verdict of acquittal for two out of three of the defendants. We are not trying to criticize counsel, but merely call the court's attention to these matters because we believe that the allegedly grievous injury so earnestly insisted upon by counsel is but a "mere afterthought." Counsel, by not moving for a mistrial, allowed the jury to proceed to a verdict.

In *Johnson v. U. S.*, 318 U. S. 189, 87 L. ed. 704, 63 S. Ct. 549, this court said:

> "We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him."

When counsel finally called the court's attention to the fact that defendants were absent the record shows that so far as the trial judge was concerned it was mere inadvertence. He said, "Correct you are." The defendants were then brought to court and the incident was carefully explained to all of them. The instruction was repeated verbatim in their presence. The record shows that the instructions and questions were identical. No attempt is made by counsel to show otherwise.

Where, then, is the injury? Were the accused deprived of their right to be confronted by the witnesses or to meet the jury face to face? Were defendants deprived of their right to consult with counsel at the time of the instructions? If so did they not have that right restored to them immediately afterward? They do not contend that the full report of all proceedings is not shown by the record.

The fact that the judge immediately went over the whole matter shows that due process was not denied but by so doing the trial judge emphasized the requirements of due process. He did more than was necessary to insure a fair trial. The record affirmatively and unmistakably shows that defen-

dants could not possibly have been prejudiced by the instructions given in their absence.

We admit that it is the established rule in Alabama and almost every other jurisdiction that defendant must be present at all important steps of his trial. We have not attempted to make an issue of this well established rule, nor dispute cases cited by petitioner in support of it. This rule does not militate against the rule that circumstances preceding, attending, and succeeding an absence may show that there was no possibility of injury to substantial rights, the error if any, being corrected. *Ferguson v. State*, 24 Ala. App, 491. 137 So. 315; cert. den. 223 Ala. 521, 137 So. 317. *McNutt v. State*, 25 Ala. App. 129, 142 So. 773; *Boyd v. State*, 153 Ala. 41, 45 So. 591; *Ray v. U. S.*, 114 F. 2d. 508, certiorari denied 311 U. S. 709, 85 L. ed. 461, 61 S. Ct. 318. Rule 45, Supreme Court of Alabama. Title 7, Rule 45. Code of Alabama, 1940. See also *Whittaker v. State*, 173 Ark. 1172, 294 S. W. 397; *Lowman v. State*, 80 Fla. 18, 85 So. 166.

Reference is here made to a helpful annotation in 144 A. L. R. 199, and cases therein cited dealing with the right of accused to be present in a criminal case during the argument of a question of law. Since the instructions in the case at bar deal purely with questions of law and since counsel were present the cases therein noted are persuasive.

The case of *Lee v. State*, 13 So. 2d. 583, 591, so often quoted by petitioner is readily distinguishable

from this case. The Lee case announced the rule that a defendant in a capital case could not waive his presence at the time the verdict is received. It it to be noted that the jury in that case was discharged and no attempt was made to remedy the error. Further, Alabama statute specifically grants to defendant in criminal cases the right to poll the jury. Title 30, § 100, Code of Alabama, 1940. In the instant case the issue does not relate to the reception of the verdict, neither was there a discharge of the jury before the irregularity was corrected. The element of final and incurable injury caused by the discharge of a jury in no way enters the question now before this court.

CONCLUSION

The particular facts and circumstances of this case show that the only right deprived petitioner is a mere technical right. In relation to the facts and circumstances of this case the right to be present at the time insisted upon would have availed petitioner nothing. Further the whole record shows affirmatively that there was no possibility of prejudice to the several defendants. It is submitted that the record affirmatively shows: 1. A fair and impartial trial; 2. A fair hearing; 3. A fair opportunity to be heard. The conditions of due process within the meaning of the Fourteenth Amendment have been fulfilled.

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

WILLIAM N. McQUEEN,
Acting Attorney General,

JOHN O. HARRIS,
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Counsel for the State.

BERNARD F. SYKES,
Assistant Attorney General,

On the Brief.

CERTIFICATE OF SERVICE.

I hereby certify that I have forwarded copy of the foregoing Brief to Hon. G. Ernest Jones, Birmingham, Alabama, Attorney for Petitioner, on this the 12th day of April, 1944.

WILLIAM N. McQUEEN,
Acting Attorney General,

Counsel for State of Alabama.